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ABSTRACT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 203.

JAMES HENNESSY, MAURICE HENNESSY, ARMAND CASTELLON, AND EMANUEL CASTAIGNE, APPELLANTS,

vs.

RICHARDSON DRUG COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

RECORD FILED DECEMBER 8, 1904.

(18,941.)

(18,341.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 15, 1902.

1 In the Supreme Court of the United States, October Term, 1901.

JAMES RICHARD MAURICE HENNESSY, JAMES FRANCIS Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, Emmanuel Castaigne, Appellants,
against
RICHARDSON DRUG COMPANY, Appellee.
} No. —.

Come now the appellants, James Richard Maurice Hennessy, James Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne by Adolph L. Pincoffs, their counsel, and say that in the record and proceedings filed herein there is manifest error in this, to wit:

1. The United States circuit court for the district of Nebraska erred in dismissing appellants' bill for want of jurisdiction.

2. Said United States circuit court erred in making its order and decree that the jurisdictional allegations in the amended bill were not sufficient.

3. Said United States circuit court erred in holding that it was incumbent on appellants to plead and prove that appellants were "subjects" of the Republic of France.

4. Said United States circuit court erred in holding that the evidence did not show the diverse citizenship of appellants and appellee.

5. Said United States circuit court erred in holding that it was incumbent on appellants to prove the diversity of the citizenship of appellants and appellee.

6. Said United States circuit court erred in attempting to
2 pass upon the merits of the suit after dismissing the suit for want of jurisdiction.

The said appellants, therefore, pray that the decree of dismissal may be reversed, annulled and held for nothing, and that they may be restored to all things which they have lost by occasion of the said decree.

A. L. PINCOFFS,
Counsel for Appellants.

3 In the Supreme Court of the United States.

JAMES RICHARD MAURICE HENNESSY, JAMES FRANCIS HENRY Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne, Appellants,
vs.
RICHARDSON DRUG COMPANY, Appellee.

Statement of parts of the record which appellants deem necessary for the consideration of the errors on which they intend to rely.

1. Amended bill.

2. Answer.

3. Replication.
4. Depositions of plaintiffs taken in Cognac, France.
5. Certificate of Commissioner of Patents as to the registration of plaintiffs' trade-mark.
6. Opinion of the court.
7. Order of dismissal.
8. Assignment of error and petition for appeal.
9. *Nunc pro tunc* decree dismissing complaint.
10. Order allowing appeal.
11. Certificate of appeal.

A. L. PINCOFFS,
Counsel for Appellants.

4 In the Supreme Court of the United States.

JAMES RICHARD MAURICE HENNESSY, JAMES Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne, Appellants,
vs.
RICHARDSON DRUG COMPANY, Appellee.
} 77 T. Certificate.

Received this 28th day of February, 1902 from Richard S. Horton, solicitor for appellants, a carbon copy of the statement of errors and the abstract of the record filed in said Supreme Court.

CHAS. F. TUTTLE,
Solicitor for Appellee.

5 In the Supreme Court of the United States.

JAMES RICHARD MAURICE HENNESSY, JAMES FRANCIS Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, Emmanuel Castaigne, Appellants,
against
RICHARDSON DRUG COMPANY, Appellee.
} No. —.

Appeal from the circuit court of the United States for the district of Nebraska.

Pleas before the Hon. William H. Munger, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States, within the eighth judicial district, at the May, 1901, term thereof.

Be it remembered, that on the 11th day of April, 1898 the amended bill of complaint was filed in the clerk's office of said circuit court, which said bill is in words and figures following, to wit:

6 In the Circuit Court of the United States for the Judicial District of the State of Nebraska.

JACQUES RICHARD MAURICE HENNESSY, JACQUES Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne

against

RICHARDSON DRUG COMPANY, a Corporation.

} In Equity.

To the honorable judges of the circuit court of the United States for the judicial district of Nebraska:

First. Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, all of Cognac in France, and citizens of the Republic of France, bring this, their bill of complaint against Richardson Drug Company of the city of Omaha, county of Douglas, State of Nebraska, a resident of the judicial district aforesaid, and a citizen thereof, and thereupon your orators complain and say:

Second. Complainants state that at all times hereinafter mentioned they were copartners under the firm name and style of James Hennessy and Company. That the complainants are and for a long time previous to the commission of the grievances hereinafter mentioned, have been exporters, bottlers and vendors of a cordial or liquor known as Hennessy brandy, which the complainants and their predecessors in the partnership business have for upwards of thirty years last past produced, bottled and sold.

Third. That said brandy when bottled by these complainants is put up in peculiar tall dark-colored bottles, to wit: twelve inches in height, bearing (*a*) a rectangular label bearing the inscription "Jas. Hennessy & Co. cognac" in gold letters on a white ground,
7 encircled by a wreath of vine leaves and grapes, in gold, said wreath being surmounted by an arm bearing a battle-axe, also in gold; (*b*) a small oblong label of white with gold border lines, bearing the word "France" in gold; (*c*) a crescent-shaped label; (*d*) a cork branded with the words "Jas. Hennessy & Co.;" (*e*) a metal capsule; all with their own proper devices and trade-marks adopted by the complainants for that purpose the year A. D. 1870, and all encased in square wooden boxes holding twelve bottles each.

Fourth. That by reason of the long experience and great care of the complainants in their said business, and the good quality of said brandy, distinguished as it was by its trade-marks, trade-names, labels, corks, capsules, and the shape, size and color of its bottles, the same has become widely known in the community and throughout the world as a useful and valuable cordial and acquired a high reputation as such, and has commanded, and still commands an extensive sale throughout the United States and Europe, which is and has been a source of profit to these complainants. That the value of said trade-mark exceeds the sum of $2,000.00.

That said brandy when bottled by complainants is known as such brandy to the public, buyers and consumers thereof by the said name of James Hennessy and Company's brandy, or Hennessy brandy, or Hennessy cognac, together with the complainants' own proper devices, trade-names and trade-marks aforesaid, and by its straw wrappers or casings accompanying and enclosing said bottles, and by the peculiar shape and color of the bottles themselves. That the trade-mark of complainants is and has been during all the acts herein complained of, properly registered in the United States Patent Office in the city of Washington, District of Columbia, under the act of Congress approved March 3, 1881.

8 Fifth. Complainants state that notwithstanding the long and quiet use and enjoyment by the complainants of said trade-name and trade-mark and to the form, device and descriptive matter of said labels, the defendant, well knowing the premises and with the preconceived intention to injure the complainants, and with the purpose to defraud them and with the purpose to deprive these complainants of the benefits and profits resulting from the great reputation acquired for said brandy, and the consequent demand therefor, and with the intent to acquire for itself the benefits and profits of said reputation, and with the intent to palm off on on the public brandy not being exported, sold or bottled by complainants, as the goods of the complainants, and in wilful disregard of complainants' rights in the premises, kept, offered for sale and sold, and advertised for sale, and now keeps, offers for sale and sells in Omaha, county of Douglas, and State of Nebraska, and elsewhere in the United States of America, a concoction or compound in imitation of complainants' brandy under the name of "Hennessy brandy," using fac-similes of complainants' trade-name, devices and labels which, with intent to deceive and defraud the public and the buyers and consumers thereof, it has caused to be put up in cases like complainants'; and in bottles precisely like those used by these complainants as aforesaid.

Sixth. That such imitation is calculated to deceive the purchasers and consumers of said brandy, and is calculated to cause the public and the buyers and consumers thereof to believe that the brandy kept and offered for sale and sold by defendant is the brandy exported bottled and sold by the complainants.

Seventh. That such imitation is calculated to deceive and mislead the purchasers and consumers of the complainants' brandy, and has actually deceived and misled and still does mislead many

9 of them to buy the brandy or liquor sold by the defendant in the belief that it is the brandy exported and bottled by the complainants, to the great loss, injury and damage of the complainants.

That the article so put up and sold by the defendant is of greatly inferior quality to that of the complainants, and deleterious to the health of the consumer, and the general esteem and reputation of the brandy exported by the complainants, has been and is now being injured and damaged thereby.

Eighth. Forasmuch as your orators can have no adequate relief,

except in this court, and to the end therefor- that the defendant may, if it can show why your orators should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived.

And that the defendant may be decreed to account for and pay over the income or profits thus unlawfully derived from the violation of your orators' rights, your orators pray that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court perpetually enjoining and restraining the said defendant, its clerks, attorneys, agents and servants from keeping, offering for sale, or selling brandy not being the brandy exported and bottled by your orators, put up in bottles of the general form, shape and color of complainants' bottles, and wrapped with labels of the form, device, and in the manner complained of, or in any other form and device, which shall be a colorable imitation of complainants' brandy or from applying to any such brandy the name "Hennessy brandy," or from using upon or in connection with said brandy the name "Hennessy," or any combination of such name or name of like sound, and that the defendant deliver up to your orators all bottles having thereon said false labels, and also all such false labels in its possession or under its control to the end and purpose that the same may be destroyed.

And that your honors upon the rendering of the decree above prayed may assess, or cause to be assessed, in addition to the profits to be accounted for by the defendant as aforesaid, the damages your orators have sustained by reason of the premises.

May it please your honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said Richardson Drug Company commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

(Signed) ADOLPH PINCOFFS,
JAMES L. HOPKINS,
RICHARD S. HORTON,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
The Judicial District of Nebraska, } *ss.:*

Richard S. Horton on behalf of said complainants, Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, and duly authorized to act for them herein, being on his oath sworn, deposeth and says that he has read the above bill of

complaint, and that the matters therein set forth are true to his best knowledge, information and belief.

RICHARD S. HORTON.

Subscribed and sworn to before me, this 11th day of April, 1898.

BRYCE CRAWFORD,

[NOTARIAL SEAL.] *Notary Public.*

11 And upon the 7th day of February, 1898 an answer was filed in the clerk's office of said circuit court, which said answer is in words and figures following, to wit:

12 In the Circuit Court of the United States for the Judicial District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, Armand Castillon, Emmanuel Castaigne, Copartners as James Hennessy & Co.,
vs.
THE RICHARDSON DRUG CO., a Corporation.
} In Equity. 77 T.

The Answer of the Above-named Defendant to the Bill of Complaint of the Above-named Plaintiffs.

In answer to said bill, the above-named defendant says:

1. As to whether or not, there is located at Cognac, France, or elsewhere, a copartnership by the name of "James Hennessy & Co." this defendant has not sufficient knowledge or information to expressly admit or positively deny that allegation of the plaintiffs' bill, but upon the best information, now obtainable, to this defendant, it denies that there is such a copartnership as "James Hennessy & Co." located at Cognac, France, or elsewhere, and denies that there is such a man as James Hennessy connected with such a copartnership, if any such copartnership there be. As to whether or not the complainants, under the firm name of "James Hennessy & Co." ever produced, bottled and sold any cordial or liquor known as "Hennessy brandy," this defendant has not sufficient and definite information or knowledge to enable it to admit or deny that allegation of the bill, but from the best information now in its possession, this defendant alleges that said copartnership, if any such there be, never produced, bottled or sold any cordial or liquor known as "Hennessy brandy."

2. This defendant admits, however, that there is sold in the markets of the United States a cordial or liquor, labeled and known as "Jas. Hennessy & Co., cognac,—France," and that these complainants claim to be the proprietors, producers, and venders of said liquor and that said liquor is put up in bottles substantially

13 of the character described in the third paragraph of the complainants' bill, and are labeled substantially as described in said paragraph of the complainants' bill, but this defendant alleges that the liquor contained in such bottles, thus labeled, is not "cognac."

3. That cognac is a French brandy of superior quality, distilled from wines produced in the neighborhood of "Cognac," a town of France in the province or department of Charante, famous for the production and distillation of said liquor and that said liquor is obtained and distilled from wines produced from grapes grown in the neighborhood of Cognac and throughout the province of Charante, France, and that the general purchasing public understand the word "cognac" applied to liquors to imply and mean a brandy distilled at Cognac, obtained from grape wine, produced from grapes grown in the neighborhood of that city; that "cognac" produced and distilled at Cognac, France, from the wines produced from grapes grown in that part of France is a superior quality of liquor or brandy and is so known and regarded by the general purchasing public, throughout the United States, but this defendant alleges that the liquor or brandy, bottled and labeled as aforesaid and which these complainants claim to produce and vend in the market of the United States, is not and never has been obtained from wines produced in the neighborhood of Cognac or in the province of Charante, or even in France, but on the contrary alleges the fact to be that the said liquor brandy thus claimed to be produced and sold in the markets of the United States by these complainants under the above-described label, is distilled, produced, bottled and labeled in the United States; that the liquor sold in the bottles above described and under the above-described label and which complainants claim to produce, distill, bottle and label at the town of Cognac, France, is not an imported liquor at all, but in order to
14 deceive and defraud the purchasing public, these complainants label and advertise said liquor by their so-called trade-mark as "cognac," implying and meaning that it is "cognac brandy," or liquor produced as aforesaid and in the aforesaid manner, at the town of Cognac, in France; that the liquor actually bottled and sold by these complainants is, as compared with cognac, a vile and deleterious concoction, and that the alleged trade-mark, or label, is a fraud, used by complainants to deceive the purchasing public.

4. Referring to the "peculiar, tall, dark-colored bottles" mentioned in the third paragraph of the complaint, the defendant admits that said bottles are peculiar, but that the most peculiar feature about them is that they are so deceptively cast that they contain neither a quart nor a pint of liquor, although the large size of such bottles placed upon the market are advertised by complainants to contain a quart of liquor, and are so constructed that from their height and general appearance they are made to appear of the size of a quart bottle and made to look as though they would contain a quart of liquor, but when inverted or critically examined it will be discovered that the bottom of the same is so deceptively constructed and cast that the said bottles contain considerably less than a quart, and that this is equally true of the pint bottles, of "a peculiar dark color" used by the complainants, and that not only in the labels used but also in the bottles containing the liquid sold, the complainants have been and are now engaged in swindling and defrauding the public, and that whatever, if any, property right, or value, the

complainants may have acquired in the use of their alleged trade-mark, or name, or in the use of their "peculiar, tall, dark-colored bottles" they have acquired the same through the instrumentality of a long course of falsehood and misstatements.

15 5. That as to whether or not the complainants have ever offered for sale or sold, or are now offering for sale, or selling any of their alleged "cognac" within the State of Nebraska, this defendant has not sufficient information or knowledge whereon to form a belief but it alleges that if complainants are now making, or have ever made sales of their alleged "cognac" within the State of Nebraska they have sold the same and are offering the same for sale in violation of not only the laws of the Commonwealth of Nebraska, but in violation also of the revenue laws of the United States, in that the complainants have not, and never have had any license under the State law of Nebraska to sell or offer for sale their alleged "cognac" at any point within said State, nor have they now, nor have they ever had any license from the United States Government to offer their alleged "cognac" for sale or to sell the same within the State of Nebraska, or elsewhere within the United States.

6. This defendant admits that it is a corporation organized and existing under the laws of the State of Nebraska, and is engaged in business in the city of Omaha within said State.

7. And still further answering the bill of complaint, this defendant denies each and every paragraph and allegation thereof, except such allegations thereof as are hereinbefore admitted to be true.

JOHN P. BREEN,
CHAS. F. TUTTLE,
Solicitors for Defendant.

Waiving any and all right to the benefit of the order heretofore entered in this case, taking the bill of complain*ants pro confesso*, the complainants by their solicitors hereby consent to the filing of this answer on or before the February rule day, 1898, of said court and consent that the same may be treated as the answer of the defendants as though no default had been made or entered of record against them upon "appearance day."

JAMES HENNESSY ET AL.,
By RICHARD S. HORTON,
Solicitor for Complainants.

16 And thereupon afterward, to wit: on the 2nd day of May, 1898 a replication was filed in the clerk's office of said circuit court, which replication is in words and figures following, to wit:

17 In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

JACQUES RICHARD MAURICE HENNESSY, JACQUES FRANCIS Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne
against
RICHARDSON DRUG COMPANY, a Corporation. } No. —.

The replication of Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne, complainants, to the answer of the Richardson Drug Company.

These repliants saving and reserving unto themselves now and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things these repliants are, and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray as in and by their said bill of complaint they have already prayed.

RICHARD S. HORTON,
Solicitor for Complainants.

18 Thereupon afterwards, to wit: on the 9th day of August, 1898, the depositions by Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne were filed in said case, which said depositions are in words and figures following, to wit:

19 *Commission.*

UNITED STATES OF AMERICA,
District of Nebraska.

In the Circuit Court of the United States for the District of Nebraska.

The President of the United States of America to Geo. Jackson, consul of the United States of America at Cognac, of the Republic of France, Greeting:

Know ye, that in confidence of your prudence and fidelity you have been appointed and by these presents you are invested with full power and authority to examine

Jacques Richard Maurice Hennessy,
Jacques Francis Henry Hennessy,
James Richard Charles Hennessy,
Armand Castillon and
Emmanuel Castaigne,

on their corporal oath, as witnesses in a cause depending in the circuit court of the United States for the district of Nebraska, wherein Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, are plaintiffs, and Richardson Drug Company is defendant, on the part of the plaintiffs upon the interrogatories annexed to this commission, and therefore you are hereby authorized and required to cause them to come before you at such time and place as you may therefor designate and appoint, and carefully to take their teestimony upon all the said interrogatories attached to these presents, and none others, under the oath or affirmation of said witnesses by you in that behalf duly administered, and the same, when thus taken and signed and certified by you, together with this commission, and the papers hereto annexed, you will return to the clerk of our said court, at Omaha, Nebraska, United States of America, with all convenient speed.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 29th day of August, A. D. 1899. Issued at my office in the city of Omaha, under the seal of said circuit court, the day and year last aforesaid.

OSCAR B. HILLIS, *Clerk.*

RICHARD S. HORTON,
Att'y for Pl't'ff.

20 Interrogatories to be propounded to Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon, and Emmanuel Castaigne.

Int. 1. State your name, age, residence and occupation.

Int. 2. State the history of the firm James Hennessy & Co. and the trade-names, trade-marks and brands if there are any, used by that firm?

Int. 3. State the various kinds of bottled cognac exported by the firm of James Hennessy & Co. to the United States of America, and the source of such cognac, the manner in which it is bought, grown, selected, blended, or otherwise treated by James Hennessy & Co. before it is bottled?

Int. 4. What personal knowledge have you of the source, age, character and quality of the cognac so bottled by James Hennessy & Co. If your knowledge is such as to advise you of the facts, describe fully the source, age, character and quality of such bottled cognac?

Int. 5. Where are the various bottled cognacs of James Hennessy & Co. referred to hereinbefore, bottled; and if at Cognac, in France, state how long they have been bottled at said Cognac, in France, and

whether they have ever been bottled in any other city or locality in the world?

Int. 6. What knowledge have you of the plant of Jas. Hennessy & Co.? If you have knowledge enabling you so to do, describe that plant and its location fully, attaching to your testimony such ground plans designs, maps, prints, engravings as may better explain the character situation, purpose, capacity, nature, departments, and particularly the bottling machinery, if any, in said plant contained.

Int. 7. Where and by whom are the capsules used by Jas. Hennessy & Co. in bottling their brandies made? If they have ever been made by any other person at any other place you will so state in your answer.

21 Int. 8. Where and by whom are the labels used by Jas. Hennessy & Co. in bottling their brandies made? If they have ever been made by any other person at any other place you will so state in your answer.

Int. 9. Where and by whom are the wood cases used by Jas. Hennessy & Co. in bottling their brandies made? If they have ever been made by any other person in any other place you will so state in your answer.

Int. 10. Where and by whom are the corks used by James Hennessy & Co. in bottling their brandies branded? If they have ever been branded by any other person at any other place you will so state in your answer.

Int. 11. State the provisions of the law of the Republic of France relating to adulteration of drink products, if any, setting forth the exact language of the act and the date of its enactment.

Int. 12. State what inspection, if any, your product is subject to under said act, or otherwise, for the determination of its purity, and state any other facts which in your judgment tend to show whether the bottled cognac of Jas. Hennessy & Co. exported to the United States are pure or adulterated.

Int. 13. Name some chemists or other experts, official or unofficial, who have analyzed said bottled cognac, giving the present residence of such chemists or other experts, and the name of the consul of the United States before whom their testimony in this behalf may be taken?

Int. 14. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them or that may be material to the subject of this examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

22 JAS. HENNESSY & Co.
vs.
RICHARDSON DRUG COMPANY.

1. Jacques Richard Maurice Hennessy, 64 years, Cognac, brandy merchant.

Jacques Francis Henry Hennessy,	57	"	"	"
James Richard Charles Hennessy,	31	"	"	"
Armand Castillon,	52	"	"	"
Emmanuel Castaigne,	52	"	"	"

2. Richard Hennessy, Esq. of New York came over to France in 1765 to establish a house, as a brandy merchant, at Cognac under the name of Hennessy, Connelly & Co. In 1771 the above firm underwent a change, and the same business was carried on by Hennessy & Saule until the latter's death in 1778. Between this time and Jan. 1, 1813 the business was conducted under the name Richard Hennessy & Son & Hennessy & Turner. From the last-mentioned date until the present moment the firm has been known as Jas. Hennessy & Co. The marks and brands of firm Jas. Hennessy & Co. are as follows:

On casks the words: Jas. Hennessy—Cognac.

On cases the words Jas. Hennessy—Cognac and the trade-mark which is a mailed arm grasping a battle-axe.

On large bottle labels the words: Jas. Hennessy & Co. Cognac surrounded by a wreath of grape vines, with the arm and battle-axe above the words.

On neck labels, various marks to distinguish the age of the brandy in each bottle, these labels are as follows: (See page 2.)

3. There is but one kind of brandy, as far as quality is concerned made by this house but the prices differ according to the age of the liquor. The source of our cognac is from the distillation of grape wine, said wine being produced in the departments known as "Les Charentes." We buy the brandy from local growers who have themselves distilled it or the wine made from grapes grown
23 in the Charente vineyards and distill it ourselves. These vineyards are owned mostly by local growers, although members of the firm Jas. Hennessy & Co. supply some wine from their vineyards. The distilled liquors and wines are carefully selected by members of the firm personally from samples submitted to them. We blend brandy by mixing several growths of the same year's product so as to obtain a uniform standard.

Our treatment consists in maturing our cognac in wood simply.

Price-list.

Brand.

(Mailed arm grasping battle-axe.)

Jas. Hennessy.

Cognac.

These marks, except 1 star are found on neck labels.	"Fine pale"	1 star
	" "	2 star
	" "	3 star
	" "	V O
	" "	S O
	" "	X O
	" "	X S O
	" "	X X O
	" "	Oldest and finest.

On corks is branded the name Jas. Hennessy & Co. and also the sign or distinctive mark found on the neck label, the whole enclosed in an oblong square.

On capsules is found the trade-mark *i. e.* arm and battle-axe, and the words Jas. Hennessy & Co. Cognac. The words are arranged around a circle in the center of which is the trade-mark.

4. Each member of the firm knows personally of the source, age, character and quality of brandy bottled by us.

24 The source of our cognac is already described in the foregoing question (No. 3).

The age of our cognac is from one year to 60 years.

The character of our brandy is pure, a fact for which the name Jas. Hennessy stands.

The quality is the best that the cognac district affords.

5. Our brandies have always been bottled at Cognac, France, and never by this firm in any other city or locality in the world. This firm has never given permission to any other agents or other persons to bottle our cognac in any other city or locality nor to permit the use of bottles bearing our labels for such a purpose. Our brandy has always been bottled in Cognac.

6. Each member of the firm Jas. Hennessy & Co. has an accurate knowledge of every building and every part of every building connected with our establishment.

We have general stores located on the east bank of the River Charente about 100 yards south of the Avenue Denfert-Rocherean in the city of Cognac, department La Charente, France where are our offices, bottling plant, cooperage, blending vats, some storehouses, etc. These cover an area of over six acres. In different parts of the town and in the suburbs we have many storehouses which cover an additional 18 acres. The capacity of all our storehouses is 50,000 half pipes. The capacity of our blending vats 60 half pipes each. We supply to the trade 300,000 to 350,000 cases of cognac annually, and about 7000 half pipes. Our bottling plant consists of machinery to fill bottles, compress and insert corks, and to fix the capsules. We have sufficient machines to meet whatever demand our trade may make upon us.

7. The capsules used by Jas. Hennessy & Co. are made by
25 Betts & Cie., 3 Quai Chartrons, Bordeaux. This firm has made all our capsules for the past 35 years continuously.

8. All the labels used by us have been made by two houses between whom our orders for said labels have been divided. They are E. Pichot, 54 Rue de Clichy, Paris and V. Palyart, 67 Faubourg, St. Denis, Paris. No others have made our labels.

9. All our wood cases have been made in Cognac and nowhere else. They have been supplied us by Lucien Marchand and many small dealers.

10. All corks used by us in bottling cognac are made and branded in Cognac by M. Gelle under our supervision. They have been neither made nor branded by any other person or elsewhere.

12. Our establishment has not been visited by any government officials to inspect our products. There has been an analysis of our

cognac by the municipal chemists at Paris the result of which was satisfactory; we have never experienced any difficulty with the authorities of France or any other country on account of the quality of our brandy. We have always shipped to the U. S. the one quality we make, pure cognac brandy, with the characteristic flavor known as Hennessy's, which is produced by blending the various products of the same year from different vineyards so as to always obtain the characteristic standard.

11. *Extrait du Code Penal.*

Article 423. (L. du 13 Mai 1863.) Quiconque aura trompé l'acheteur sur le titre de la matière d'or ou d'argent, sur la qualité d'une pierre fausse vendue pour fine, sur la nature de toute marchandise, quiconque, par usage de faux poids, ou de fausses mesures aure trompe sur la qualité des choses vendues, sera puni d'un emprisonnement pendant trois mois au moins, un an au plus, &
26 d'une amende qui ne pourra excéder le quart des restitutions & dommages interêts, ni etre au dessous de 50 francs.

Les objets du délit, ou leur valeur, s'ils appartiennent encore au vendeur, seront confisqués; les faux poids & les fausses mesures serent aussi confisquées, & de plus brisée.

Le tribunal pourra ordonner l'affiche du jugement dans les lieux qu'il désignera, & son insertion intégrale ou par extrait dans tous les journaux qu'il désignera, le tout aux frais du condamné.

Loi.

Tendant a la Repression Plus Efficace de Certaines Fraudes dans la Vente des Marchandises.

(27 Mars 1851.)

Article 1er. Seront punis des peines portées par l'art. 423 du Code Penal:—1. Ceux qui falsifieront des susstances au denrees alimentaires ou medicamenteuses destinées a etre vendues:—2. Ceux qui vendront cu mettront en vente des substances cu denrees alimentaires cu medicamenteuses qu'ils sauront etre falsifiées ou corrompues:—3. Ceux qui auront trompé ou tenté de tromper, sur la qualité des choses livrées, les personnes aux quelles ils vendent ou achètent, soit par l'usage de faux poids ou de fausses mesures, ou d'instruments inexacts servant au pesage ou mesurage, soit par des manœuvres ou procedés tendant a fausser l'operation du pasage ou de mesurage ou à augmenter frauduleusement le poids ou le volume de la marchandise, même avant cette operation; soit, enfin, par des indications frauduleuses tendant a faire croire a un pesage ou mesurage antérieur & exact.

Loi.

Qui Declare Applicables aux Boissons les Dispositions de la Loi du 27 Mars 1851.

27 (5 Mai 1856.)

Art. 1er. Les dispositions de la loi du 27 Mars 1851 sont applicables aux boissons. (Modifie; L. du 24 Juillet 1894) (I)

Art. 2. L'article 318 & le No. 6 de l'art. 475 du Code Penal sont & demeurent abrogés.

(I.) Cette loi du 24 Juillet 1894 ne traite que de l'alcoolisation & du mouillage des vins, elle n'a rien innove en ce qui concerne les autres boissons.

13. The following chemical analysis has the signature of the chemist certified by the U. S. consul general at London.

From the analysis of three samples of brandy received in October last from Messrs. Twiss & Brownings bearing the marks Jas. Hennessy & Co. Cognac & distinguished by the brands (here are given one star, two stars, three stars) on the corks, results were obtained showing that, in each instance, the brandy was of superior quality. The analytical data established that point conclusively; but, as is usual in such cases, as will be seen by comparing those data, they did not fully indicate the relative quality of the several samples which is wholly due to age and is acquired by keeping good brandy either in cask or bottle. Those differences elude chemical analysis, and are recognizable only by the gustatory sense. But in regard to the quality of the brandy bearing any one of the marks above mentioned, I have no hesitation in expressing my opinion that it is the genuine concentrated product of the grape resulting from fermentation and distillation.

(Sign.) DR. B. H. PAUL.

28

	1 star.	2 star.	3 star
Specific gravity	9374	9383	9383
Alcohol	39.7	39.7	39.7
Acidity	.036	.036	.046
Extractive	.65	.71	.71
Ethers	.048	.053	.052

14. The preceding answers fully set forth the facts connected with our business. If anything is omitted it is not consciously or willingly done.

We, the undersigned, Jacques Richard Maurice Hennessy, Jacques Francis Henry Hennessy, James Richard Charles Hennessy, Armand Castillon and Emmanuel Castaigne, do solemnly swear that the foregoing facts are true answers to the interrogatories made to us by George H. Jackson, U. S. consul, at La Rochelle, but formerly at Cognac, France.

MAURICE HENNESSY.
JACQUES FRANCIS HENRY HENNESSY.
JAMES HENNESSY.
ARMAND CASTILLON.
E. CASTAIGNE.

Sworn to and subscribed before me.

GEORGE H. JACKSON,
U. S. Consul. [SEAL.]

La Rochelle, France.

29 Thereupon afterward, to wit: on the 26th day of April, 1899 the certificate of the Commissioner of Patents, marked "Exhibit A, John W. Battin, examiner in chancery" was filed in said case, which Exhibit A is in words and figures following, to wit:

30 DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the trade-mark registered by Jas. Hennessy & Co. October 25, 1881, number 8,770 for brandy.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the city of Washington this 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

(Signed) A. P. GREELEY,
[SEAL.] *Acting Commissioner of Patents.*

31 No. 8770.

The United States of America to all to whom these presents shall come:

This is to certify that by the records of the United States Patent Office it appears that Jas. Hennessy & Co. of Cognac, France, did on the 28th day of September, 1881, deposit in said office for registration fac-similes of a certain trade-mark for brandy and the date of the receipt thereof was duly noted and recorded; that on the 28th day of September, 1881, they deposited therewith a statement and a written declaration under the oath of Jas. Hennessy, a member of *of* said firm, copies of all of which are hereto annexed; and the said firm having made the payment of a fee of twenty-five dollars, and complied with the regulations in such cases prescribed by the Commissioner of Patents and in all other respects complied with an act of Congress approved March 3, 1881, entitled "An act to authorize the registration of trade-marks and protect the same," the said fac-similes, statement, and declaration were duly recorded, and the said trade-mark has been duly registered in the said Patent Office this 25th day of October, one thousand eight hundred and eighty-one, and protection therefor will remain in force for thirty years from said date unless sooner terminated in accordance with section 5 of said act.

In testimony whereof the seal of the Department of the Interior is

hereto affixed this 25th day of October, 1881, and of the Independence of the United States the one hundred and sixth.

Given under my hand at Washington, D. C.

E. M. MARBLE,
Commissioner of Patents.

[L. S.]

32 Thereupon afterwards, to wit, the 28th day of June, 1901 a memorandum opinion was filed in said case, which said memorandum opinion is in words and figures following, to wit:

33 In the Circuit Court of the United States, District of Nebraska.

JAMES HENNESSY ET AL.
vs.
RICHARDSON DRUG COMPANY. } No. 77 T.

JAMES HENNESSY ET AL.
vs.
WALTER MOISE. } No. 90 T.

JAMES HENNESSY ET AL.
vs.
CARRIE R. MAY ET AL. } No. 123 T.

Mr. Horton, for complainants.
Mr. Tuttle and Mr. Breen, for respondents.

Opinion.

MCPHERSON, *J.:*

I think the bills in all three cases should be dismissed at the costs of the complainants. It is due to counsel that I state my reasons. But I shall state the reasons without extended discussion.

1. Complainants do not make a case under the act of Congress of March 3, 1881. There is neither allegation nor proof that any one of respondents has been doing business, or is likely to engage in business in any grade or brand or manufacture of brandies, with any Indian tribe or with any people of a foreign country.

34 It is very doubtful if they or any of them with such liquor has done an interstate business. It is clear to me that Congress by the act did not mean to cover an interstate business because of the doubtful constitutional validity. Aside from the commerce clause, the Constitution gives Congress the power to legislate with reference to business with the Indians and foreign countries.

2. The several bills do not plead jurisdictional facts to give complainants a standing in court. Their cause of action, if they have any, is because of the amount in controversy, and diverse citizenship, and not under the act of Congress of March 3, 1881.

The amount in controversy is said to be over two thousand dollars, because of plaintiffs' right of property in their common-law trade-mark. Respondents' citizenship in each case is alleged to be

that of the State of Nebraska. But complainants' citizenship or alienage is not alleged, as required.

Stuart *vs.* Easton, 156 U. S. 46.

Randot *vs.* Township of Rogers, 79 F. R. 676.

Of course this is technical, but it always is and must be so.

Leave to amend is asked so that the proper allegations can be made. This will be denied. While this is discretionary, and generally leave to amend is granted, yet in these cases every claim asserted by complainants is so technical as to be almost without merit. By this is not meant that there is doubt of the value of complainants' trade-mark. I have no doubt of that. Neither have I doubt of its great value to complainants. But the alleged grievances in these cases are that a few bottles of brandy were sold, and that the bottles and labels were in imitation of complainants'. But there is not the slightest pretense that any of the respondents is a pirate in the business. On the contrary the proofs are that the imitations would deceive any one but the complainants themselves, and
35 that the respon-ents supposed they were getting complainants' brandies. But a very few bottles were sold, and those with the utmost good faith. And even then there is no word of proof that these bottles did not contain complainants' brandies.

Complainants' trade-mark and their property right is now, and for years has been fully established. It is denied by no one.

Decrees of this court in these cases in favor of complainants could not give them a stronger title or a more substantial showing than they now have. And I do not believe that the powers of this court should be exercised to grant an injunction because of the innocent or mistaken sale of one or two bottles of brandy, and then a reference to a master to ascertain damages of one or two dollars, all entailing much costs for some of the parties to pay. If any of respondents were likely to annoy or injure complainants in the future, the case would be quite different.

As it is I believe that it is much the more nearly justice by ending the cases where they now are.

And it is ordered that the several bills as amended be dismissed at complainants' costs.

June 28, 1901.

36 Thereupon afterward, to wit: on the 3rd day of August, 1901 an order and decree was entered and filed in said case, and entered of record on the journal of proceedings in said court had on said day, which said order and decree is as follows, to wit:

37 JAS. JENNESSY ET AL.
vs.
RICHARDSON DRUG COMPANY. } 77 T.

The parties by their attorneys come and submit this cause to the court on the pleadings and evidence; and upon due consideration thereof, the court finds that complainants' bill as amended should be dismissed at complainants' costs.

It is therefore ordered and adjudged that complainants' bill be and the same hereby is dismissed, and that defendant go hence without day and recover of the complainants its costs herein. To which finding and judgment the complainants then and there duly except.

38 Thereupon afterward, to wit: on the 5th day of October, 1901 "assignment of error" was filed in said case, which said assignment is in words and figures following, to wit:

39 In the Circuit Court of the United States for the District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, Armand Castillon, Emmanuel Castaigne, Copartners as James Hennessy & Co., Complainants, *against* RICHARDSON DRUG COMPANY, Respondent.	77 T. Assignment of Errors.

The United States circuit court for the district of Nebraska which entered a decree of dismissal of complainants' bill in said cause erred as follows:

In dismissing complainants' bill for want of jurisdiction.

In order that the foregoing assignment of errors may be and appear of record, the complainants present the same to the court, and pray that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and complainants pray a reversal of the decretal order and decree of dismissal made and entered by said court.

ADOLPH L. PINCOFFS,
RICHARD S. HORTON,
Solicitors for Complainants.

40 Thereupon afterward, to wit: on said 5th day of October, 1901 "petition of allowance of appeal" was filed in said case, which said petition is in words and figures following, to wit:

41 In the Circuit Court of the United States for the District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, Armand Castillon, Emmanuel Castaigne, Copartners as James Hennessy & Co., Complainants, *against* RICHARDSON DRUG COMPANY, Respondent.	77 T. Petition of Allowance of Appeal.

The above-entitled complainants conceiving themselves aggrieved by a decree of dismissal made and entered on the 3rd day of August, 1901 whereby it adjudged and decreed that complainants' bill filed in said cause be dismissed for want of jurisdiction with costs to the respondent, now come by their solicitor and counsel, Richard

S. Horton, Esq., and petition the said court for an order allowing said complainants to prosecute an appeal from said decree to the United States Supreme Court upon the sole question of jurisdiction, under and according to the laws of Congress and the statutes of the United States in such cases made and provided, and also that an order be made fixing the amount of security which complainants shall give and furnish upon said appeal, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Supreme Court. And your petitioners will ever pray.

ADOLPH L. PINCOFFS,
RICHARD S. HORTON,
Solicitors for Complainants.

42 Thereupon afterward, to wit: on said 5th day of October, 1901 "decree" was filed in said case, which said decree is in words and figures following, to wit:

43 In the Circuit Court of the United States, District of Nebraska.

JAMES HENNESSY
vs.
RICHARDSON DRUG COMPANY; Also vs. WALTER Moise *et al.*; Also vs. Carrie May *et al.* } 77 T, 90 T, 123 T.

Decree.

The decree heretofore entered August 3, 1901 is expunged and the following decree is entered.

The parties by their attorneys submit this cause to the court on the pleadings and evidence. And the court files a written opinion herein, which opinion is here and now referred to, and made of record in this case, as the views of the court.

And the court finds that neither the bill, nor the bill as amended nor the evidence shows the citizenship of complainants, or any of them so as to confer jurisdiction upon this court.

And the court further finds with and for the defendants and against the complainants on the evidence, and that the bill as amended is without equity.

And for both and all the reasons hereinbefore recited, it is ordered and adjudged that complainants' bill, and the bill as amended be and the same are hereby dismissed, and that defendants go hence without day, and recover of the complainants all costs herein. To which findings, judgment and decree the complainants at the time except.

And this decree is signed and entered as of the date of Aug. 3, 1901.

SMITH McPHERSON, *Judge.*

44 Thereupon afterward, to wit: on said 5th day of October, 1901 "order allowing appeal" was filed in said case, which said order is in words and figures following, to wit:

45 In the Circuit Court of the United States, District of Nebraska.

JAMES HENNESSY, MAURICE HENNESSY, ARMAND Hennessy, Emmanuel Hennessy, Copartners as James Hennessy, Complainants,
vs.
RICHARDSON DRUG COMPANY; Also *vs.* CARRIE May *et al.*; Also *vs.* Walter Moise *et al.*
} 77 T, 123 T, 90 T.

On motion by Richard S. Horton, solicitor and of counsel for complainants, it is ordered that the appeal to the United States Supreme Court from the final decree herein dismissing said action for want of jurisdiction, and because of a want of equity in the bill as amended and the evidence, as shown by the said decree, be and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and opinion filed and all proceedings herein be forthwith transmitted to said United States Supreme Court.

It is further ordered that the bond of appeal be fixed at the sum of $50.00, the same to act as a supersedeas bond for costs and damages on appeal.

Dated Oct. 1, 1901.

SMITH McPHERSON,
Circuit Judge.

46 Thereupon afterward, to wit, on said 5th day of October, 1901 "certificate for appeal" was filed in said case, which said certificate is in words and figures following, to wit:

47 Circuit Court of United States, District of Nebraska.

JAMES HENNESSY ET AL.
vs.
RICHARDSON DRUG COMPANY.
} 77 T.

HENNESSY
vs.
WALTER MOISE ET AL.
} 90 T.

HENNESSY
vs.
CARRIE R. MAY ET AL.
} 123 T.

It is certified that the question of jurisdiction referred to in the opinion was passed upon—but that the case was also determined upon its merits.

The question of jurisdiction set forth in the opinion filed herein together with the question of the merits of the case is hereby certi-

fied to the Supreme Court, all of which are shown by the decree and the opinion.

Oct. 1, 1901.

SMITH McPHERSON, *Judge.*

48 [Endorsed:] File No. 18,341. Supreme Court U. S. October term, 1901 Term No. 203 James Richard Maurice Hennessy *et al.* app'ts *vs.* Richardson Drug Company. Statement of errors and designation by appellants of parts of record to be printed & proof of service of same. Filed March 6", 1902.